

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 04-429
Table of Allotments,)	RM-11120
FM Broadcast Stations.)	
(Burlington and Cary, North Carolina))	

NOTICE OF PROPOSED RULE MAKING

Adopted: December 8, 2004

Released: December 10, 2004

Comment Date: January 31, 2005

Reply Comment Date: February 15, 2005

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it for consideration a Petition for Rule Making filed by Capstar TX Limited Partnership ("Petitioner"), licensee of Station WRSN-FM, Channel 230C, Burlington, North Carolina, pursuant to Sections 1.401 and 1.420(i) of the Commission's Rules. Petitioner requests the reallocation of Channel 230C to Cary, North Carolina, and the modification of the license of Station WRSN-FM accordingly. Petitioner states that it will apply for Channel 230C when allotted to Cary and further states that it will construct the facilities as authorized.

2. Petitioner states that it desires to change the community of license for Station WRSN-FM from Burlington to Cary under the guidelines set forth in *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*.¹ Petitioner states that the proposed use of Channel 230C at Cary is mutually exclusive with the current use of Channel 230C at Burlington. Petitioner further states that Burlington will not be deprived of its only local service because it is currently served by three other aural services: Stations WBAG(AM), WKXU-FM,² and WPCM(AM). Finally, petitioner states that the provision of a first local service to Cary satisfies Priority 3 of the Commission's allotment priorities,³ thus resulting in a

¹ 4 FCC Rcd 3870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). The Commission stated that a station may change its community of license without subjecting the license to other expressions of interest if (1) the proposed allotment is mutually exclusive with the current allotment; (2) the current community of license will not be deprived of its only local service; and (3) the proposed arrangement of allotments is preferred under the Commission's allotment priorities.

² The call sign for this station has changed to WZTK-FM.

³ In determining whether to approve a change of community, we compare the existing versus the proposed arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), *recon. denied*, 56 RR 2d 448 (1983). The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

preferential arrangement of allotments when compared to the retention of a fourth local service at Burlington.

3. Petitioner states that no change to the physical facilities of Station WRSN-FM is necessary in order to change the community of license from Burlington to Cary. Station WRSN-FM is currently short-spaced to Station WMEV-FM, Channel 230, Marion, Virginia, Station WTHZ-FM, Channel 231C, Lexington, North Carolina, and Station WGBT-FM, Channel 233C1, Eden, North Carolina. These short-spacings have been in existence since 1964, and Channel 230C at Burlington is grandfathered pursuant to Section 73.215 of the Commission's rules.⁴ Because the proposed change of community would involve no facilities change, no additional short-spacing would be created, nor would any existing short-spacing be exacerbated. For that reason, Petitioner asserts that the proposal is permissible.⁵

3. Cary is located within the Raleigh, North Carolina Urbanized Area, so the proposed relocation requires analysis under the Commission's policy regarding the migration of stations to urban areas.⁶ Petitioner therefore provides a *Tuck* analysis in support of the proposed change of community. Petitioner states that the 70dBu contour of Station WRSN-FM currently encompasses 100 percent of the Raleigh Urbanized Area, and will continue to do so following the proposed change of community. Cary's population is 34 percent that of Raleigh, and Cary is located 12.7 kilometers from Raleigh. Petitioner states that Cary is independent from Raleigh based on the eight factors enumerated in *Tuck*. Petitioner represents that 16,242 of the 51,175 employed individuals residing in Cary work at their place of residence, comparing favorably with other independent communities. *The Cary News* is a weekly publication with a circulation of 15,000 that covers local news and contains other articles of local interest. Petitioner states that residents perceive Cary, with a unique identity and history, as separate from Raleigh. Cary was first settled in 1750 as Bradford's Ordinary. The town of Cary was founded in 1854 and incorporated in 1871. The population of Cary has grown significantly in the past thirty years, tripling in the 1970s and doubling in the 1980s and 1990s. Cary's Planning Department estimates that Cary's population was 107,221 as of October 1, 2003, and will be 176,384 by July 1, 2020.

4. Cary has an independent government, led by a mayor and six council members, who are each elected to four-year terms. Cary has numerous administrative offices and departments, and the government of Cary provides municipal services to residents, including police and fire protection, garbage collection, water and sewer services, planning, and inspections. Cary spans two zip codes, 27511 and 27519, and has its own separate listings in the local telephone company directory. Cary is home to a variety of businesses and commercial establishments, including numerous local businesses that incorporate the word "Cary" in their names. Numerous health care

⁴ 47 C.F.R. §73.215.

⁵ Petitioner cites the following decisions: *Kankakee and Park Forest, Illinois*, 16 FCC Rcd 6768 (MMB 2001); *Killeen and Cedar Park, Texas*, 15 FCC Rcd 1945 (MMB 2000); *Oceanside and Encinitas, California*, 14 FCC Rcd 15302 (MMB 1999); and *Newman and Peachtree City, Georgia*, 7 FCC Rcd 6307 (MMB 1992).

⁶ See *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) ("*Tuck*").

and medical service providers are located in Cary, and Cary is home to several churches. Local businesses advertise in *The Cary News*, which enables them to reach the residents of Cary without relying on Raleigh media sources. Finally, Cary has its own library, and its police and fire protection are provided independent of any other jurisdiction.

5. This proposal warrants consideration because the proposed allotment would provide Cary with a first local aural broadcast transmission service. The proposed reallocation of Channel 230C at Cary could be made at the current reference coordinates for Channel 230C at Burlington.⁷ Accordingly, we seek comment on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Burlington and Cary, North Carolina:

<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Burlington, North Carolina	230C, 266C	266C
Cary, North Carolina	----	230C

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required in paragraph 2 of the Appendix before a channel will be allotted.

8. Pursuant to 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before January 31, 2005, and reply comments on or before February 15, 2005, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554. Additionally, a copy of any filing should be served on the counsel for the Petitioner, as follows:

Mark N. Lipp, Esq.
J. Thomas Nolan, Esq.
Vinson & Elkins L.L.P.
1455 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20004-1008

9. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m.

⁷ Those reference coordinates are: 35-52-15 NL and 79-09-40 WL. The site restriction for the facility will be 35.4 km (22.0 miles) west of Cary.

to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. All envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.⁸ This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

11. For further information concerning this proceeding, contact Deborah A. Dupont, Media Bureau, at (202)418-7072. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the proceeding has been decided and such decision in the applicable docket is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or any summary of any new information shall be served by the person making the presentation upon the other parties to the proceeding in the particular docket unless the Commission specifically waives this service requirement. Any comment which has not been served on the Petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

⁸ See *Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend 47 C.F.R. Sections 73.202(b), 73.504 and 73.606(b)*. 46 FR 11549 (February 9, 1981).

APPENDIX

1. Pursuant to authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the FM Table of Allotments, 47 C.F.R. Section 73.202(b), as set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments (*see* 47 C.F.R. Section 1.420(d).)

(b) Petitions for rule making which conflict with the proposals in this *Notice* will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; service. Pursuant to applicable procedures set out in 47 C.F.R. Sections 1.415 and 1.420, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. The person filing the comments shall serve comments on the petitioners. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. A certificate of service shall accompany such comments and reply comments (*see* 47 C.F.R. Section 1.420(a), (b) and (c).) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents

shall be furnished the Commission.

6. **Public Inspection of Filings.** All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center, at its headquarters, 445 12th Street, S.W., Washington, D.C.